No. 09-875

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSHUA ELI RAFF,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

While this Court has given no definitive statement on the precise scope of the Fifth Amendment right not to be compelled to incriminate oneself[1] in the context of a police stop, its cases allow little room for debate. "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). A person approached by a police officer "may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 498 (1983). If "detained" "the detainee is not obliged to respond" to any questions posed by an officer. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1983). The only information that an officer can constitutionally compel is the person's name. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004).

Given these pronouncements, it seems clear that when LAPD Officer David Bambrick detained Joshua Raff and questioned him, Raff had a right to remain silent. The question that this case poses is whether the prosecution can eviscerate that right by introducing

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[1] " . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." (*Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

Raff's exercise of it and arguing that his silence was affirmative evidence of his guilt.

This is the question reserved in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."

I. THIS CASE CLEANLY POSES THE QUESTION RESERVED IN *JENKINS v. ANDERSON*.

Respondent agrees that this Court has yet to answer the question reserved in *Jenkins* and that a fundamental split on that question exists among the Circuits and the State Courts. Respondent, however, argues that this case is so "unique" that this Court should remain silent on the question and allow the split to fester.

A. The Subjective Knowledge and Intent of the Officer Is Irrelevant.

The uniqueness Respondent relies upon is that Officer Bambrick, when questioning Raff, did not know about the robberies Raff would later be charged with. This is a facile distinction that is irrelevant to the outcome of the issue. It made no difference to Raff what the officer knew since his answers to the officer's questions would have been as potentially

incriminating[2] whether the officer was specifically seeking information about the robberies or not, and only Raff's perspective is relevant.

This Court has consistently avoided having constitutional questions turn on the subjective knowledge or intent of the officer. *Berkemer v. McCarty*, *supra*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Rhode Island v. Innis*, 446 U.S. 291, 301, (1980) (subjective intent of police officer to obtain incriminatory statement not relevant to whether an interrogation has occurred); *Whren v. United States*, 517 U.S. 806, 813, (1996) (refusing to evaluate Fourth Amendment reasonableness in light of the officers' motivations); *New York v. Quarles*, 467 U.S. 649, 655-656, and n.6, (1984) (subjective motivation of officer irrelevant in considering whether the public safety exception to *Miranda* is applicable).

The appropriate focus is not on what the questioner knows or is seeking but on what the witness reasonably believes an answer will disclose. In *Kastigar v. United States,* 406 U.S. 441, 445, (1972), the Court plainly said that the Fifth Amendment

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[2] A statement is potentially incriminating if it "would furnish a link in the chain of evidence needed to prosecute him." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

privilege against self-incrimination "protects against any disclosures *that the witness reasonably believes* could be used in a criminal prosecution or could lead to other evidence that might be so used." (Emphasis added.)

Respondent strives to characterize the officer's questions as "innocuous," but this simply was not the case. Bambrick described the encounter as an "evasive" chase that ended with a compelled stop and the immediate handcuffing and arrest of the driver, Bowen. Simultaneously, Bambrick detained Raff – directing him to place his hands on the dashboard or on his knees – and then ordered him out of the car, and when Raff did not respond to Bambrick's questions he too was immediately arrested. While Bambrick might not have known what Bowen and, for the sake of argument, Petitioner were running from, he was certainly probing to find out. This is not, as Respondent tries to present it, a situation in which an officer is simply asking innocuous questions.

Rather, Bambrick was interrogating Raff with questions that if answered would at the very least have connected him with Bowen, and in *Grunewald v. United States*, 353 U.S. 391, 421-422 (1957) this Court agreed that acknowledging a pre-existing relationship with a suspect provides an incriminating "link": " . . . [H]ad Halperin stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent. . . ."

Under the circumstances of his detention Raff reasonably believed he was being asked questions the answers to which "could be used in a criminal prosecution or could lead to other evidence that might be so used," and Respondent's argument that the officer's knowledge was determinative has no merit.

B. The Decision Below Was Incorrect.

Respondent next argues that the decision below was correct, and thus, certiorari should not be granted. We obviously disagree. Respondent's analysis misses the mark in at least two broad respects: It confuses impeachment cases with substantive use cases and it mischaracterizes the scope and reach of the constitutional right to remain silent.

This Court's precedents say that a person has the right to remain silent in virtually any investigative or prosecutorial encounter with the authorities. This extends from the trial context, *Griffin v. California*, 380 U.S. 609 (1965), investigative grand juries, *Kastigar v. United States,* 406 U.S. 441, 444 (1972), and formal custodial interrogations (*Miranda v. Arizona*, 384 U.S. 436 (1966), as well as to less formal situations such as police-citizen encounters, *Florida v. Royer*, *supra*, 460 U.S. 491, 498 (1983), detentions short of arrest, *Terry v. Ohio*, 392 U.S. 247, 29 (1984), and traffic stops, *Berkemer v. McCarty*, *supra*, 468 U.S. 420, 439-440 (1983), where the Court explained:

> * * * , the usual traffic stop is more analogous to a so-called "*Terry* stop," *see Terry v. Ohio,* 392 U.S. 1 (1968), than to a formal

> arrest. . . . "[T]he stop and inquiry must be *reasonably related in scope to the justification for their initiation.*" *Ibid.* (*quoting Terry v. Ohio, supra, at* 392 U.S. 29.) *Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond.* (Footnotes omitted, *emphasis* in original.)[3]

The only exception to these rulings that the Court has recognized – in which a person can be compelled under penalty of arrest and prosecution to disclose information – actually underscores the breadth of the rule. In *Hiibel v. Sixth Judicial District Court Of Nevada, Humboldt County*, *supra*, 542 U.S. 177 (2004), the Court recognized a carefully

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[3] Contrary to another of Respondent's arguments (Opp. 18), Raff is relying upon, not challenging, *Berkemer*, and is not arguing that "*Miranda* warnings" should have been given at or before the time that he chose to remain silent. Our position is simply that per *Malloy* and other relevant precedent, the Fifth Amendment guaranteed him a right to remain silent and that having exercised that right his silence could not be used to his detriment at trial whether he'd been informed, warned or reminded of this right by the police or anyone else. (Pet. 26-27) Respondent's "anticipatory invocation" argument and reliance on *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) is particularly inapt since, as Justice Scalia notes in beginning the opinion, "This case presents the question whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding constitutes an invocation of his *Miranda* right to counsel," which has nothing to do with the case at hand.

limited exception to the right to remain silent in the face of police questioning in requiring a detained person only "to disclose his name in the course of a valid *Terry* stop." *Id.* at 188. That exception was recognized only because the Court concluded that the Nevada law was extremely narrowly drawn and that disclosing one's name "is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." (*Id.* at 191) It was further circumscribed by a finding that, "In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him," or that it "would furnish a link in the chain of evidence needed to prosecute" him. *Id.* at 190. Mr. Hiibel apparently just didn't think his name was any of the officer's business and, believing the constitution was on his side, stood his ground.

The dissenters would not have approved even this miniscule exception to the "broad constitutional right to remain silent." (*Id.* at 192, Stevens, J., dissenting.) In a separate dissent Justice Breyer wrote:

> This lengthy history of concurring opinions, of references, and of clear explicit statements means that the Court's statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years. *Id.* at 198.

This case presents the Court with the opportunity to decide squarely if the promises made in

cases such as *Terry*, *Berkemer* and *Hiibel* are merely dicta or carry the force of constitutional law.

Respondent, on the other hand, seems to suggest that the Fifth Amendment's right to remain silent is coextensive only with the scope of *Miranda* warnings. While *Miranda* protected and strengthened the "right to remain silent" by requiring that a person about to be interrogated in custody be warned of his rights, it did not change *Malloy's* definition or reach of the right itself, which are clearly independent of and pre-exist the warning. Respondent's claim that "it is only the right to remain silent after the *Miranda* warnings that is of constitutional dimension" (Opp. at 17) is simply wrong. As pointed out above and in our Petition, the right extends to virtually any encounter with authorities.

Finally, Respondent also confuses "substantive use" cases with impeachment cases notwithstanding that, "[A]s long ago as *Raffel v. United States*, 271 U.S. 494, this Court recognized the distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes." *Jenkins v. Anderson*, 447 U.S. 231, 241 (Stevens, J. dissenting.).

The *impeachment* cases relied on by Respondent – *Doyle v. Ohio*, 426 U.S. 610 (1976), *Jenkins v. Anderson*, 447 U.S. 231 (1980) and *Fletcher v. Weir*, 455 U.S. 603 (1982) – simply address a different constitutional question and use a different constitutional analysis to decide them. Raff is not challenging

these cases and Respondent's reliance on them is misplaced.

For these reasons and more to be addressed in a merits brief if certiorari is granted, Petitioner believes that *Malloy*, *Griffin*, *Hiibel* and the Court's other cases applying the self-incrimination clause establish a general, constitutional rule prohibiting *substantive* use of a individual's silence in the face of virtually any official questioning, while *Jenkins* and *Weir* create exceptions to that rule limited to the *impeachment* context based on a separate and distinct due process analysis that uses the giving of *Miranda* warnings as a demarcation point.

After thirty years of rampant confusion the opportunity to clarify these questions of fundamental Fifth Amendment jurisprudence concerning the use of a detainee's silence as affirmative evidence of guilt is squarely before the Court.[4]

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[4] Respondent also urges that certiorari be denied because the decision below was not published, and while it is true that the decision below is not in the official reports it is easily located on Westlaw, *People v. Raff*, 2009 WL 2035874 (2009). This argument might have some merit were this the first decision to create a conflict, but it is not. The conflict here has been discussed and debated for 30 years, ever since *Jenkins* left the question unanswered, and the remarkable spectrum of opinion on the question that has resulted is explored at Pet. 18-24 and in the cases cited therein.

II. USE OF PETITIONER'S SILENCE AS EVIDENCE AND THE PROSECUTOR'S ARGUMENT THEREON WERE NOT HARMLESS.

Respondent claims that any error in admitting evidence of Petitioner's silence and allowing the prosecutor to argue it as substantive evidence of guilt was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, (1967). This clearly is not so.

The case against Raff was anything but strong. He was identified by two witnesses at trial, both of whom initially described someone quite different from Raff to the police. Mr. Gomez described the robber as man in his thirties, 5' 6", 160 pounds. Nonetheless, at trial, he identified Raff, *who is 19 years old, 5' 9", 200 pounds*, as the robber.[5] Mr. Tifford, who is himself Black, described the robber to police as a "male Hispanic or a Black person," 5' 8", 150 pounds. He nonetheless identified Raff, who is *Caucasian, 5' 9", 200 pounds,* as the robber at trial.

The circumstantial evidence pointed almost exclusively to Bowen as the robber. (*See* Pet., at 9.) Thus, the prosecution of Raff was founded on the

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[5] Respondent curiously explains these discrepancies (Opp. 22) by acknowledging that Mr. Gomez didn't actually get a very good look at the robber: "[A]lthough Gomez initially described the robber as older and smaller than petitioner, Gomez explained he was uncertain about the size and age of the robber because the robber was wearing a hooded sweatshirt."

exceptionally weak identifications,[6] the fact that he was in Bowen's car and his silence. The silence, coming when Raff had just been ordered from Bowen's car, was particularly harmful as it seemed to tie him to Bowen and the items in the car far more than just his mere presence as a passenger.

As this Court has noted, admission of silence can be particularly devastating. "Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted." *U.S. v. Hale*, 422 U.S. 171, 180 (1975). When used as substantive evidence of guilt it has even greater potential to prejudice the jury.

Respondent tries to prop up its claim by overstating the evidence. Two instances in particular are easily refuted.

First, Respondent claims a number of times that Raff personally threw the handgun "out of the car during the police pursuit." (Opp. at 22.) In actuality, Officer Bambrick's testimony supports no such definitive statement. All Bambrick saw was that during the chase Petitioner's body appeared "as if he's leaning somewhat out the passenger window." Bambrick

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[6] "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *U.S. v. Wade*, 388 U.S. 218, 228-29 (1967).

never saw Petitioner extend his hand out the window, *never* saw anything in his hand, *never* saw him toss anything, and "couldn't tell you" if anything was thrown from the car. (This trial testimony is attached and appears at App. 2-3) Advocates are entitled to argue reasonable inferences from incomplete facts but they are not allowed to argue them as if they are "unchallenged" facts.

Second, Respondent makes a bold statement (Opp. 4) that after the arrests of Bowen and Raff "there were no more similar robberies committed in Santa Monica." Such hyperbole is valueless since the "support" for this is Bambrick's testimony, in response to a single question, only that he was personally unaware of any local crimes that "resembled this type of M.O." In any event, such a claim is meaningless and misleading as to Raff since if Bowen was the sole perpetrator the same "result" would be true.

Chapman itself belies Respondent's harmless error argument. Regarding the improper use of trial silence against Mr. Chapman (*Griffin* error), this Court wrote:

> [T]hough the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners (citation omitted) it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has

> demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions.

386 U.S. at 26.

If with "reasonably strong" evidence against Chapman, it was "completely impossible" for the State to meet the "harmless error" test, in a case as frail as the one against Joshua Raff establishing "beyond a reasonable doubt" that the error in this trial "did not contribute to petitioners' conviction" lies somewhere beyond "completely impossible."

CONCLUSION

Certiorari should be granted in this case to resolve the clearly presented issues of fundamental Fifth Amendment jurisprudence that have troubled the lower courts for some thirty years.

Respectfully submitted,

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COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT,	
VS.	NO. SA060350
JOSHUA ELI RAFF, DEFENDANT-APPELLANT.	MAR 25 2008

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE KATHERINE MADER, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

JUNE 5, 2007

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* * *

[658] Ronald White Q SO YOU'RE FOLLOWING A VEHICLE. AND AT SOME POINT YOU SAW THE PASSENGER, THE PERSON YOU'VE IDENTIFIED AS MR. RAFF, APPEAR AS IF HE'S LEANING SOMEWHAT OUT THE PASSENGER WINDOW; IS THAT RIGHT?

David Bambrick A YES, SIR.

Q I KNOW YOU – I'VE SEEN YOUR REPORT. YOU NEVER SAW HIM EXTEND HIS HAND, DID YOU?

A NO, SIR.

Q AND YOU NEVER SAW ANYTHING IN HIS HAND; CORRECT?

A NO, SIR.

Q AND YOU NEVER SAW MR. RAFF TOSS ANYTHING; CORRECT?

A NO.

Q AND, IN FACT, IMMEDIATELY AFTER YOU SAW HIM LEANING, THE CAR TURNED THE CORNER AND YOU LOST SIGHT OF IT?

A YES, SIR.

Q AND IT WAS AT THAT POINT AROUND THAT CORNER THAT YOU EVENTUALLY CAME BACK, AND YOU FOUND A FIREARM IN THAT LOCATION; IS THAT CORRECT?

[659] A YES, SIR.

Q SO YOU AREN'T ABLE TO SAY IF EITHER MR. BOWEN, THE DRIVER, OR MR. RAFF, THE PASSENGER, WHO, IF EITHER ONE OF THEM, EITHER TOSSED THAT GUN OUT OF THE CAR OR HAD ANYTHING TO DO WITH THE GUN; CORRECT?

A NO, I COULDN'T TELL YOU.

* * *